Risk Management

THREE RISK MANAGEMENT BASICS

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This ongoing column is dedicated to providing information to our readers on managing legal risks associated with medical practice. We invite questions from our readers. The answers are provided by PRMS, Inc. (www.prms.com), a manager of medical professional liability insurance programs with services that include risk management consultation, education and onsite risk management audits, and other resources to healthcare providers to help improve patient outcomes and reduce professional liability risk. The answers published in this column represent those of only one risk management consulting company. Other risk management consulting companies or insurance carriers may provide different advice, and readers should take this into consideration. The information in this column does not constitute legal advice. For legal advice, contact your personal attorney.

QUESTION: When I hear about medical malpractice lawsuits involving doctors in my community or reported in the media, it often leads to discussions with my colleagues about what is involved in malpractice litigation. What must a plaintiff prove in order to prevail in a medical malpractice lawsuit?

ANSWER: There are four elements to a malpractice lawsuit, and the plaintiff must prove all four in order to prevail (i.e., in order for the defendant to be found liable). Those elements are 1) a duty of care, 2) a breach of the duty, 3) damages, and 4) proximate cause.

Duty of care. The physician owes a duty of care to the patient (to meet the standard of care). The duty of care arises from the special, legally recognized relationship between the physician and the patient. The psychiatrist owes a legal duty of care to his or her patients, but the obligation is not simply to care for them in any way she or he sees fit. The psychiatrist must care for patients in accordance with the standard of care. The standard of care, like the duty of care, is a legal concept, not a clinical concept; however, the legal concept is based on the clinical care. The exact definition of the standard of care varies from state to state and can have a great deal of nuance.

Breach of duty. The physician is negligent (the care provided fell below the standard of care). The failure to meet a legal duty is called negligence. In a medical malpractice lawsuit, the plaintiff must show that the physician was negligent. Malpractice actions must contain allegations of negligence (e.g., negligent treatment, negligent prescribing). Negligence can be defined as the failure to meet the standard of care. It is important to understand that negligence in this context is accidental. It is an unintentional wrongdoing, as distinguished from an intentional wrongdoing (e.g., assault and battery).

Damages. The patient suffers an adverse outcome (injury). Malpractice is more than simply negligence; there must be an injury as well. Legal injuries can be physical, emotional, or financial. Medical/professional malpractice is the act(s) or continuing conduct of a physician that does not meet the standard of professional care and results in injury/damage to the patient, such as an error or omission. It does not include the exercise of professional judgment even when the results are detrimental to the patient. In other words, if a psychiatrist's

actions fall below the standard of care, but there is no injury, then there is no malpractice. There is only negligence. Also, a psychiatrist can use proper professional judgment and there may still be a bad outcome (e.g., a bad reaction to a medication). A bad outcome is not itself evidence of malpractice, as exemplified in the adage "the operation was a success, but the patient died anyway."

Proximate cause. The patient's damages are a direct result of the physician's negligence. This element is often the crux of a lawsuit. The plaintiff must show that his or her injuries were the result of the defendant's actions. The concept of proximate cause is grounded in foreseeability. If the patient's injury was a foreseeable consequence of the negligence, the psychiatrist will be held liable. If the patient's injury was not foreseeable, or if some intervening act was the catalyst for the injury, the psychiatrist will not be held liable. This is usually the most difficult element to prove.

Scenario. Here is a simplistic example to illustrate the elements: A patient was hospitalized after attempting suicide. Four days later, he was discharged from the hospital and committed suicide a few hours later. The representative of the estate is suing the psychiatrist who discharged the patient. The following demonstrate the argument that will be made by the plaintiff:

1. *Duty of care*
   That the psychiatrist had a duty to perform a suicide assessment on the patient prior to discharge
2. *Breach of duty*
   That the psychiatrist discharged the patient without performing a suicide assessment
3. *Damages*
   That the patient died as a result of suicide after being discharged
4. *Proximate cause*
   That but for the psychiatrist's failure to conduct the suicide assessment prior to discharge, the patient would not have committed suicide (i.e., if the psychiatrist had done his job, this would not have happened).

As mentioned previously, the plaintiff must prove all four elements in order to prevail.

QUESTION: I know my patient care must always meet the standard of care, but how exactly is the standard of care defined and determined?

ANSWER: The exact definition of *standard of care* varies by state, but generally, it is the degree of skill, care, and diligence exercised by members of the same profession or specialty practicing in light of the present state of medical science. It is important to keep in mind that the standard of care does not mean optimal care, but includes a range of acceptable treatment options.

There are many factors that could be used as evidence of the applicable standard of care for a particular patient care issue. These factors that determine the applicable standard of care include, but are not limited to, the following:

- Federal and state statutes—such as federal and state prescribing laws
- Federal and state regulations—such as regulations from your state medical board, the Food and Drug Administration, or the Drug Enforcement Agency
- Other statements from federal and state regulatory agencies—such as guidance documents, position papers, or policy statements from your state medical board
- Authoritative clinical guidelines—such as the American Psychiatric Association's (APA) practice guidelines (www.psych.org) or the American Academy of Child and Adolescent Psychiatry's (AACAP) practice paramenters (www.aacap.org)
- Statements/joint statements from professional organizations—such as the PhysiciansMedGuide, a joint statement by the APA American Psychiatric Association and the AACAP (and endorsed by numerous other professional organizations), which addresses the treatment of children with depression (www.physiciansmedguide.org)
- Medical code of ethics
- Treatises
- Content of continuing medical education activities
- Current professional literature and journals
- Accreditation standards—such as Joint Commission standards (www.jointcommission.org)
- A facility's own policies and procedures
- *Physicians' Desk Reference* and FDA-approved drug labeling.

In psychiatric malpractice litigation, the standard of care is established primarily by psychiatrists in the role of the expert witness. The expert witness will base his or her opinions on the aforementioned items evidencing the applicable standard of care, his or her own clinical experience and education, and the clinical record. Accordingly, the psychiatrist's documentation should support the care that was given and should enable someone else—such as an expert witness—to read the record and know what happened and why. One way to accomplish this is to document not only what happened in treatment and why, but also what actions were considered but rejected and why.

QUESTION: The APA and other professional organizations sometimes publish treatment guidelines. The facility where I work maintains policies and procedures that address the treatment of patients. Are these

treatment guidelines and policies and procedures the same as the standard of care? Am I committing malpractice if I deviate from them in the treatment of my patients?

ANSWER: Treatment guidelines and policies and procedures do not by themselves definitively establish the standard of care. The standard of care against which a psychiatrist's conduct will be measured in a malpractice action is that of a similar psychiatrist in similar circumstances. A judge or jury will consider treatment guidelines or policies and procedures as just one piece of evidence, along with other evidence, such as experts' testimony about prevailing medical practice, to define the applicable standard of care.

Reputable treatment guidelines and policies and procedures often constitute a consensus of experienced practitioners as to the prevailing medical practice in a given situation. Since the standard of care is largely determined by peers based on what the conduct of a psychiatrist should be under the circumstances, treatment guidelines and policies and procedures may closely approximate the standard of care.

Human variation precludes the development of a predetermined standard for every possible situation. Every clinical situation is different and reasonable psychiatrists can disagree; in fact, treatment guidelines sometimes conflict with each other. Should a psychiatrist deem it necessary to deviate from a recognized guideline, the psychiatrist should document and justify his or her reasoning for the deviation.

A psychiatrist should not be deemed negligent *per se* simply for departing from guidelines nor deemed innocent simply for adhering to them. In the litigation arena, treatment guidelines are one tool that can be used by both plaintiffs and defendants. Plaintiffs try to use guidelines to show that the defendant failed to observe standards of practice, whereas defendants use guidelines to show that they did observe standards of practice. For this reason, compliance with guidelines may work to the psychiatrist's advantage if they are widely recognized as authoritative. While such compliance will not conclusively defeat a negligence claim, it can go a long way toward defeating the plaintiff's argument.

As mentioned previously, a defendant psychiatrist who departed from authoritative guidelines will almost certainly have to explain his or her reasoning for the departure in court. Psychiatrists who do depart from authoritative guidelines should take care to document their reasoning and decision-making processes in patient charts. Contemporaneous documentation is one of the most powerful forms of evidence for a defense.

Reputable treatment guidelines and policies and procedures developed by professional societies must not be confused with utilization review or protocols used by managed care organizations that are influenced by economic considerations. Adherence only to utilization review and other similar protocols that do not necessarily have an authoritative clinical basis will not protect the psychiatrist in the courtroom from allegations that his or her care fell below the standard of care. ●

SUBMIT YOUR OWN QUESTION

To submit a question, e-mail Elizabeth Klumpp, Executive Editor, eklumpp@matrixmedcom.com. Include "Risk Management Column" in the subject line of your e-mail. All chosen questions will be published anonymously. All questions are reviewed by the editors and are selected based upon interest, timeliness, and pertinence, as determined by the editors. There is no guarantee a submitted question will be published or answered. Questions that are not intended for publication by the authors should state this in the e-mail. Published questions are edited and may be shortened.